Office Supreme Court, U. S.
FILED
DEC 23 1932
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 537

In the Court of Claims of the United States

OCTOBER TERM, 1932

ARTHUR C. HARVEY COMPANY, PETITIONER

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	8
Appendix: Statutes involved	9-11

CITATIONS

Cases:

American Hide & Leather Co. v. *United States*, 284 U. S. 343	7
Bonwit Teller & Co. v. *United States*, 283 U. S. 258	5
Fleischmann Const. Co. v. *United States*, 270 U. S. 349	4
Ingram-Day Lumber Co. v. *McLouth*, 275 U. S. 471	4
Lewellyn v. *Electric Reduction Co.*, 275 U. S. 243	5
Martinton v. *Fairbanks*, 112 U. S. 670	5
Moses, Frank H., and James T. Berney v. *United States*, reported in Prentice-Hall Fed. Tax Service (1932), Vol. 1, Par. 2042	7
Mueller Grain Co. v. *American State Bank*, 275 U. S. 493	4
Routzahn v. *Reeves Bros. Co.*, 59 F. (2d) 915, certiorari denied, No. 398, October Term, 1932	6
Stinson v. *Business Men's Accident Association*, 43 F. (2d) 312	5
United States v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269	7
United States v. *Smith*, 39 F. (2d) 851	5
Wilmington Steamboat Co. v. *Sturgess*, 55 F. (2d) 831	5
Wilson v. *Merchants' Loan & Trust Co.*, 183 U. S. 121	5

Statutes:

Revenue Act of 1924, c. 234, 43 Stat. 253, 343 (U. S. C., Title 26, Sec. 156)—	
Section 1014 (a), amending Section 3226, Revised Statutes	9
Revised Statutes—	
Section 649 (U. S. C. Sup. V, Title 28, Sec. 773)	10
Section 700 (U. S. C., Title 28, Sec. 875)	10
Section 3228 (U. S. C., Title 26, Sec. 157)	10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 537

ARTHUR C. HARVEY COMPANY, PETITIONER

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, Former Collectors of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts (R. 56–59) is reported in 52 F. (2d) 885. The opinion of the Circuit Court of Appeals for the First Circuit (R. 63–70) is reported in 60 F. (2d) 97. Its opinion on motion for leave to reargue (R. 77–79) is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1932. (R. 80.) A petition for rehearing was denied August 5, 1932. (R. 80.) The time within which petition for a writ of certiorari might be filed was extended to December 4, 1932, by an order of an Associate Justice of this Court made on October 24, 1932. (R. 94.) Petition for a writ of certiorari was filed December 3, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in the particular circumstances of this case a suit to recover an overpayment of income tax for the year 1918 may be maintained against the Collector of Internal Revenue in office in 1918 and/or against his successor.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 9–11.

STATEMENT

This was an action against two former Collectors of Internal Revenue to recover an alleged overpayment of income tax for the year 1918. The case was tried by the District Court without a jury. The trial court made no special findings of fact, but the facts as stated in its opinion (R. 56–57) and as they

appear elsewhere in the record may be summarized as follows:

Petitioner paid its taxes for 1918 to the respondent Malley. (R. 17.) It filed a claim for refund which also contained a request that a portion of the amount claimed should be applied to a deficiency for the year 1917. (R. 47.) The Commissioner of Internal Revenue signed a schedule of overassessments showing an overassessment to petitioner for 1918, which he sent in 1923 to the respondent Nichols, respondent Malley's successor as Collector. (R. 37.) On January 3, 1924, Nichols allocated part of the stated overassessment for 1918 to the payment of deficiencies in petitioner's income taxes for the years 1915, 1916, and 1917. (R. 56–57.) The total credit which petitioner had asked in its claim for refund to be applied to earlier tax liability was $48,563.39, while the amount actually credited by the allocation made by Nichols was $74,648.39. On February 18, 1924, the Commissioner approved this action and paid the balance of the overassessment to the petitioner. (R. 57.) At the time the 1918 assessment was in part credited against the 1915, 1916, and 1917 deficiencies, collection of the deficiencies for those years was barred by the statute of limitations. (R. 16.) No refund claim for 1915, 1916, or 1917 taxes was ever filed, but on July 24, 1929, petitioner filed a claim for refund of the portion of the 1918 taxes applied as a credit against liability for earlier

years, as stated above. (R. 39–40.) This claim was rejected December 17, 1929. (R. 46.)

The petitioner began the present suit by attachment February 3, 1930 (R. 2), and filed its declaration against Malley and Nichols in the District Court on March 26, 1930 (R. 3). The District Court gave judgment for the defendants. (R. 59.) The Circuit Court of Appeals affirmed the judgment of the District Court (R. 80), and thereafter denied a petition for rehearing (R. 80) and a motion for reargument (R. 93).

ARGUMENT

The court below held that no question of law was raised on the record for its consideration by petitioner's assignments of error in that court. The assignments of error, in the view taken by the Circuit Court of Appeals, related either to matters of fact or conclusions of law not open to review by an appellate court because there were no special findings of fact and no exceptions to rulings on matters of law duly taken in the course of trial and preserved by bill of exceptions, as required by Sections 700 and 649 of the Revised Statutes, as amended. (*Infra*, p. 10.)

The decision below may be adequately rested on this ground. See *Fleischmann Const. Co.* v. *United States*, 270 U. S. 349, 355 et seq.; *Mueller Grain Co.* v. *American State Bank*, 275 U. S. 493; *Ingram-Day Lumber Co.* v. *McLouth*, 275 U. S. 471, 474;

Lewellyn v. *Electric Reduction Co.*, 275 U. S. 243, 248; *Wilson* v. *Merchants' Loan & Trust Co.*, 183 U. S. 121, 127; *Martinton* v. *Fairbanks*, 112 U. S. 670. See also *Wilmington Steamboat Co.* v. *Sturgess*, 55 F. (2d) 831, 832–833 (C. C. A. 3d); *Stinson* v. *Business Men's Accident Association*, 43 F. (2d) 312, 314 (C. C. A. 10th); *United States* v. *Smith*, 39 F. (2d) 851 (C. C. A. 1st).

Petitioner does not specifically assign as error in this Court this holding of the court below and the question is not discussed in the petition or brief in support. As it seems clear that the petitioner did not take proper steps to preserve for review the questions which he presents, the judgment below was correct, and consideration of petitioner's arguments on the merits is therefore not necessary.

Even if it be assumed that petitioner was in a position to argue the case on the merits, nevertheless the court below correctly affirmed the judgment of the District Court.

As this suit was not brought against the United States it is unnecessary to discuss the suggestion of the court below that petitioner could have sued the United States as upon an account stated after the signing in 1923 of the certificate of overassessment by the Commissioner. See *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258. Whatever petitioner's rights in such a suit, if instituted in time,

might be, we submit that recovery can not be had against either of the present respondents in this cause. Petitioner concedes (Pet. p. 2) "that it has no cause of action against the defendant Nichols." See *Routzahn* v. *Reeves Brothers Co.*, 59 F. (2d) 915 (C. C. A. 6th), certiorari denied, October 24, 1932 (No. 398, October Term, 1932). As to respondent Malley, however, petitioner contends that it has a valid cause of action.

We believe that Section 3226 of the Revised Statutes, as amended (*infra*, p. 9), bars recovery. That section provides that suits for the recovery of any internal-revenue tax must be brought within five years of the time of payment of the tax or within two years of the disallowance of a timely claim for refund. This suit, begun in 1930, complies with neither of these requirements. It was not begun within five years of the payment of the taxes for 1915, 1916, and 1917, even if the crediting of the 1918 overassessment in 1924 be regarded as payment. It was not brought within five years after the payment of taxes for 1918. It was not brought within two years of the disallowance of the claim as to 1918, filed in 1923, because that claim was allowed. Petitioner argues that the suit was brought within two years of the disallowance of its claim for refund filed on July 24, 1929. But that claim was filed more than four years after payment, was

therefore barred by the statute (Revised Statutes, sec. 3228, as amended), and no action can be based on the denial of an invalid claim for refund. See *Moses* v. *United States* (C. C. A. 2d), decided November 14, 1932, reported in Prentice-Hall Fed. Tax Service (1932), Vol. 1, Par. 2042. Compare *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U. S. 269.

Petitioner further contends that the decision below conflicts with *American Hide & Leather Co.* v. *United States*, 284 U. S. 343. Petitioner's argument is directed not at the decision now sought to be reviewed, but to certain statements made by the court below in denying a motion for oral reargument (Pet. Br. p. 19), filed after denial of a petition for rehearing. The motion was denied because it was made out of time, but the court discussed *obiter* some of the matters upon which further consideration had been urged. It is clear that this Court should not be called on to review such dicta and we see no reason to burden the Court with a discussion thereof.

Extended discussion of petitioner's other contentions seems unnecessary. They appear to present no grounds sufficient to warrant the granting of certiorari. The judgment of the court below may be supported on several adequate grounds, which are unaffected by the arguments now advanced on behalf of petitioner.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The questions which petitioner seeks to present are not open upon the record. Furthermore, the case depends in large measure on its peculiar facts. The petition should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
FRANCIS H. HORAN,
Special Assistants to the Attorney General.
WALTER GELLHORN,
Attorney.

DECEMBER, 1932.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 343:

SEC. 1014 (a). Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to

which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

[U. S. C., Title 26, Sec. 156.]

Revised Statutes:

SEC. 649. Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, agree to waive a jury by a stipulation in writing filed with the clerk or by an oral stipulation made in open court and entered in the record. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.

[U. S. C. Sup. V, Title 28, Sec. 773, as amended by Act of May 29, 1930, c. 357, 46 Stat. 486.]

SEC. 700. When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

[U. S. C., Title 28, Sec. 875; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 936.]

SEC. 3228. All claims for the refunding or crediting of any internal-revenue tax alleged

to have been erroneously assessed or collected * * * must * * * be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. * * *

[U. S. C., Title 26, Sec. 157.]

U. S. GOVERNMENT PRINTING OFFICE: 1932